January 15. 1771.

ANSWERS

FOR

STEPHEN RONALDSON preſent Kirk-treaſurer of the Pariſh of Eddleſton, and William Cunningham Merchant in Kilwinning, Creditors of the deceaſed Robert Reid;

TO THE

PETITION of WILLIAM REID, eldeſt Son of the deceaſed Robert Reid writer to the Signet, and his Tutors and Curators, and of the other Creditors of the ſaid deceaſed Robert Reid.

ROBERT REID late writer to the ſignet, at the time of his deceaſe in the year 1766, ſtood indebted to the reſpondents ſeverally in conſiderable ſums. To the reſpondent Stephen Ronaldſon, as kirk-treaſurer of the pariſh of Edleſton, he was addebted the ſum of 2000 merks and intereſt, by bond to the treaſurer of the poors money of the ſaid pariſh, for their uſe, dated 7th November 1749. As alſo another ſum of 1,040 merks, in name and for the uſe and behoof of ſaid poor, with the intereſt thereof, by bill dated 18th December 1765, and payable 23d June 1766. To the reſpondent William Cunningham, as adminiſtrator in law for his children, he was addebted the ſum of L. 44 Sterling, and intereſt, by bond dated 31ſt October 1763.

Upon the death of Robert Reid, his eldeſt ſon William Reid, within the *annus deliberandi*, made up inventaries of the heritable eſtate belonging to his father, and thereupon ſerved heir in general, *cum beneficio inventarii*.

Thereafter the ſaid William Reid and his tutors and curators, thinking it would be profitable and expedient for his affairs to diſpoſe of his heritable ſubjects, applied to your Lordſhips, in the uſual form when minors diſpoſe of an heritable eſtate, for the authority of the court to enable them to ſell; ſetting forth, 'that they the ſaid 'tutors and curators cannot by law ſell or diſpoſe of the ſaid minor's 'heritable ſubjects, unleſs *auctore praetore*. At leaſt purchaſers 'would not incline to buy, unleſs the tutors and curators be ſo au-'thoriſed.'

Your Lordſhips having taken the cognition uſual in ſuch caſes of the heritable ſubjects and the minor's debts, to aſcertain the expediency of ſelling his eſtate, did accordingly find the ſame expedient, and allowed the tutors ſo to do.

In this application, the only perſons called by the minor and his curators as defenders were the younger children of Robert Reid and Archibald Stewart merchant in Queenſferry. Neither the reſpondents nor any of the other creditors were called, nor does it contain any concluſion of ranking the creditors, nor differ in any reſpect from the warrants daily granted by the court for the ſecurity of thoſe who purchaſe from minors.

All theſe heritable ſubjects were accordingly ſold to different purchaſers by William Reid and his curators, in ſummer 1769, by roup, whereof one of the conditions was, 'That the price of the ſaid ſub-'jects ſhall be made payable to the ſaid tutors and curators, for be-'hoof of the ſaid minor, his heirs and aſſignees.'

But none of the purchaſers have as yet paid up any part of the price, though they have entered into poſſeſſion, and have been drawing the rents ever ſince.

The reſpondents, who have been long amuſed by the curators of William Reid, with promiſes of payment of their reſpective debts, did

did ſeverally raiſe and execute ſummonſes on the paſſive titles againſt the ſaid William Reid, and his tutors and curators, and Ann Grant, relict of the ſaid Robert Reid, concluding againſt William Reid as heir ſerved and retoured to Robert Reid, and Ann Grant as executrix decerned and confirmed to, or as otherways repreſenting him, for payment of the ſeveral debts above ſpecified.

Upon theſe dependences, they have arreſted in the hands of the ſaid purchaſers of Robert Reid's ſubjects.

The tutors and curators of William Reid thereupon raiſed a multiple-poinding in name of the minor and of the purchaſers, in which they have called the whole of Robert Reid's creditors.

This proceſs, as well as the two proceſſes of conſtitution, at the inſtance of the reſpondents, came before Lord Kennet Ordinary. In the proceſſes of conſtitution, the heir was found liable *ſecundum vires inventarii*; and, in the multiple-poinding, the reſpondents produced their grounds of debt, and the arreſtments uſed by them in the hands of the purchaſers of Robert Reid's ſubjects, and craved to be preferred upon the price.

On the other hand, the heir and the other creditors of Robert Reid have contended, that theſe arreſtments were inept diligences, and could afford no ground of preference on the price: Becauſe the heir, having entered *cum beneficio inventarii*, did not repreſent Robert Reid, but was merely a truſtee, and that the effect of this truſteeſhip was to lock up the price of the eſtate ſold by him from being affected by the diligence of the defunct's lawful creditors.

The Lord Ordinary, after adviſing memorials, found the reſpondents preferable on the price; AND ADHERED upon a repreſentation

The petition now to be anſwered reclaims againſt theſe interlocutors.

The reſpondents ſhall, in the firſt place, ſubmit to your Lordſhips, on what grounds of law they apprehend, that theſe arreſtments, uſed by them in the hands of the purchaſers, are clearly effectual diligences upon the price.

It

It is an eſtabliſhed principle of the law, That the heir by entry comes in the place of his predeceſſor, and repreſents the defunct *active et paſſive*. After entry, he becomes proper debtor to the creditor of the defunct. As ſuch, every manner of diligence is by law competent to theſe creditors for recovering their debts, ſtanding in his perſon; nor can it be diſputed, that ſuch diligence is equally effectual for every purpoſe of preference in competition with one another, as in any caſe where a debtor's eſtate is attached by his creditors.

On the footing of the common law, previous to the act 1695, the heir had not any defence againſt payment of the defunct's debts; even after the ſucceſſion was exhauſted by payment to creditors, firſt inſiſting or ſecured by diligence. This was corrected by the ſtatute 1695, and the heir who uſes the benefit of inventary preſcribed by that ſtatute, is protected againſt being liable to the claims of the defunct's creditors made after the value of the defunct's ſucceſſion hath been paid away.

The words in the act are: 'And the apparent heir entering by 'inventary, in manner foreſaid, is hereby declared to be only liable 'to his predeceſſor's debts and deeds, *ſecundum vires inventarii*, and 'in as far as the value of the heritage given up in inventary will ex'tend, and no farther.'

But, as this ſtatute was ſolely deſigned to correct the hardſhip on the heir, of paying away more than he received, ſo it goes no further than to remedy that defect. The act affords a defence to the heir in certain circumſtances. But as to the means the creditors are to uſe for recovery of their payment, the act hath made no alteration whatſoever. It hath not meddled with the common courſe of legal diligence competent to the creditors for recovery, and obtaining a preference upon the eſtate of their debtor, nor hath it made the leaſt innovation upon the rules of law, in the competitions betwixt the creditors upon ſuch diligences.

And this is agreeable to the civil law, which we have cloſely followed on this ſubject. From thence we borrowed the univerſal repreſentation

repreſentation of heirs. The maxim of the civil law was, That *hæres eſt eadem perſona cum defuncto*, univerſally liable for the predeceſſor's debts. The ſame reaſon which produced the *beneficium inventarii* in that law, viz. the hardſhip on the heir to be made liable beyond the extent of the ſucceſſion, produced the act 1695 with us, adopting that remedy.

This act exactly follows the conſtitution of Juſtinian, introducing that privilege into the Roman law. But that conſtitution was confined ſolely to the giving a defence to the heir, in the circumſtance of the ſucceſſion's being exhauſted. As to the creditors, nothing was innovated: The rule was, that heirs, *cum beneficio*, 'iis ſatisfacient qui primi venerint creditoribus, et *ſi nihil reliquum* 'eſt *poſteriores venientes repellentur.*' *Lex.* 22. 3. 4. *et ſeq. Cod. De jure delib.*

The practice ever ſince the act 1695 hath accordingly been, that the heir *cum beneficio* may pay *primo venienti*; and, if diligence is uſed by any of the creditors, the ſame rules of law take place as to their preference over each other, as in any other common caſe.

So it hath been laid down by every writer on the law, ſince the act 1695, introducing the *beneficium inventarii*. Thus Macdowal, *B.* 3. *tit.* 4. § 75. and that even expreſsly in this very caſe, that if the heir, *cum beneficio*, ſells the defunct's eſtate, any of the defunct's creditors may affect the price by arreſtment in the purchaſer's hands, according to which they are to be preferred in the multiplepoinding brought by the heir and the other creditors. The ſame appears from Erskine's *Inſt. B.* 3. *tit.* 8, § 33.

A caſe is mentioned in the Dictionary, *voce* Heir *cum beneficio*, where this ſpecial point was determined. It is mentioned in theſe words: "An heir entering *cum beneficio inventarii*, the creditors are 'not brought in *pari paſſu*, but according to their diligence, as in 'ordinary caſes, *Home*, 4*th July* 1724. Scot *contra* Burnet of Leys.' And the circumſtances of the caſe were preciſely ſimilar. Sir Alexander Burnet having entered heir *cum beneficio*, ſold part of the inventary-eſtate to Mr Ferguſon, in whoſe hands, as debtor for the

price, an arreſtment was laid on by Mrs Janet Scott, creditor of the deceaſed Sir William Burnet.

The petitioners have obſerved upon this caſe, that the objections were ſtated, not by the creditors, but the heir. But this makes no manner of difference; for the general principle was decided by that judgment, and the whole argument went upon it, as appears from the report of the caſe collected in the remarkable deciſions for that period. The eſtate was inſolvent in that caſe, as well as the preſent; ſo that, no doubt, the creditors would have objected, if it had been imagined that made any alteration on the argument. Accordingly, in another caſe mentioned in the Dictionary, Creditors of Crichton, Nov. 28. 1738, where the queſtion was, How far the citation or decreet of conſtitution gave preference to a creditor in ſuch circumſtances? It was admitted on both ſides, as fixed law, that diligence done upon theſe by arreſtment would undoubtedly have given ſuch preference. And the Lords found the priority of citation or decreet gives no preference, but the whole ſubjects being *in medio, the creditors will be ranked according to their diligences affecting the ſame.* Neither has this matter ever been again brought into queſtion, but univerſally acquieſced in ever ſince the abovementioned judgment in the caſe of Scot *contra* Burnet of Leys.

Vol. 1. p. 362.

The reſpondents therefore, with ſubmiſſion, do not apprehend that the arguments uſed in this petition, which are merely gathered from analogy or imaginary expediency, would have any weight with your Lordſhips in overturning what has been ſo eſtabliſhed. The creditors of a defunct would indeed be in a very ſtrange ſituation, if it were to be conſidered as a matter ſtill *in dubio*, and admitting of ſuch arguments, whether the heir *cum beneficio* is or is not their proper debtor, and whether the diligence uſed by them is to be effectual or not for recovery of their debts. The reſpondents muſt conſider it as a matter already fixed in law, upon the facts above ſet forth, that the diligences uſed by them in this caſe are competent and legal; and therefore they are leſs anxious in making anſwers to all the general arguments thrown out in this petition.

The

The doctrine maintained by the petitioners is, that all diligences done by the creditors of the defunct are to come in *pari paſſu*. That the heir *cum beneficio* is not the proper debtor, but only a truſtee for the creditors, with the ſame powers, and to the ſame effect, as if the eſtate had been diſponed to him in truſt by a debtor not bankrupt. That, in virtue of this truſteeſhip, the defunct's eſtate is to be locked up from the diligence of creditors, and the price to be *equally* divided amongſt them, when the heir thinks fit to bring an action for that purpoſe.

The petitioners have not pretended to ſay that this doctrine applies in any one particular to the caſe of heirs entered in the common manner. The caſe of heirs *cum beneficio* is not differenced from the caſe of other heirs, further than the act 1695 hath differenced them. But the reſpondents cannot conceive how the doctrine abovementioned can be founded on that ſtatute, which indeed would be transforming it into a new bankrupt-act to all intents and purpoſes.

To have veſted ſuch a truſt as this ſet forth by the petitioners, in oppoſition to the common principles of law, would undoubtedly have required the moſt expreſs words of ſtatute; and many regulations and proviſions muſt have been required for calling and ranking the creditors and guarding againſt this heir-truſtee impoſed upon them by law.

But, ſo far are any of theſe matters from being mentioned in the ſtatute 1695, that it is perfectly clear, that nothing of this ever entered into the intendment or ſcope of the ſtatute. It was not the object of the act to introduce any new rules for dividing the value of the inventary among the creditors, but only to ſave the heir from being liable beyond the extent of it. No mention is to be found of any thing reſtraining the diligence of the creditors, nor even ſo much as any obligation upon the heir to call them in any manner of action whatever. So that, if this doctrine of the petitioners did not take place previous to the act 1695, it certainly was not created by that ſtatute.

The petitioners endeavour to ſupport this doctrine by two judg-

ments

ments of your Lordſhips, finding that the heir *cum beneficio* is bound to communicate the eaſes he receives to the other creditors. But it muſt be obvious to your Lordſhips, that the argument built upon theſe is ſtretched beyond all reaſonable bounds. For ſurely it doth not follow from thence, that your Lordſhips were of opinion, that the heir ceaſed to be proper debtor for the value of the inventary.

The judgment of the court in the abovementioned caſe, Scot *contra* Barnet, which was much about the ſame time with theſe deciſions, ſhowed the contrary, and that the court did not conſider this as impinging in the leaſt degree upon the right of the creditors to affect by diligence the eſtate of the heir as their proper debtor.

It is quite unneceſſary to follow the petitioners further into their argument upon the effect of truſt-rights by debtors, as the heir *cum beneficio* poſſeſſes under no ſuch title. At the ſame time, the reſpondents muſt be pardoned to doubt, how far it is in the power of any debtor to put his eſtate out of the diligence of creditors by a truſt-right, eſpecially when it is inſolvent.

But the petitioners ſyſtem is the moſt inconſiſtent poſſible; for they acknowledge, that the heir *cum beneficio* may pay *primo venienti*. Now, how can this be reconciled to their poſition, that he is in the ſame caſe as if the eſtate had been diſponed to him in truſt by the debtor for behoof of certain creditors, to each of whom, if the eſtate is inſolvent, only a rateable proportion is due? Surely it never could be lawful for ſuch a truſtee to make payment to a creditor of his whole debt merely upon application, whatever ſhortcoming there might be in the funds. The reſpondents therefore ſubmit what ſort of truſt-right this would make, even were it to be moulded according as it is fancied and planned out in the petition.

The petitioners argue from the analogy betwixt an executor confirmed, and an heir *cum beneficio*, which doth not in any degree hold.

The words of the ſtatute 1695 mentioned in the petition clearly refer to nothing elſe but the manner of making up the inventaries, of which thoſe in executry is adduced as an example. But the petitioners

titioners will not pretend to ſay, that thereby the whole doctrine of law regarding the executor is transferred to the heir *cum beneficio*. No parallel can be brought betwixt an heir and executor; becauſe they differ radically in this, that executry is merely an office, inferring no repreſentation of the defunct; whereas the heir is the perſon that repreſents him, whether with or without inventary. But the caſe of executors, ſo far from aiding the petitioners argument, favours entirely what hath been now pleaded by the reſpondents: For, altho' the executor be undoubtedly a judicial truſtee, yet this truſt is not underſtood to have the effect at common law, to cut out the defunct's creditors from obtaining preference by proper diligence. On the contrary, the creditors were preferable according to the priority of their decreets againſt the executor. It is true, that the law in this reſpect was ſo far altered by act of ſederunt 1622, that diligence done by the creditors within ſix months come in *pari paſſu*; yet ſtill the preference of creditors inſiſting after the ſix months, depends as formerly upon the priority of their diligence. This ſhows that it doth not neceſſarily follow, from the character of a judicial truſtee, that all the diligence of the creditors is to be ineffectual, and a *pari paſſu* preference eſtabliſhed among them; but that this requires particular laws and regulations to that purpoſe.

As it cannot be pretended, that ever any ſuch regulation was made with regard to heirs *cum beneficio*; ſo, in every view of the matter, the diligence done by the reſpondent upon the price of the defunct's eſtate ſold by the heir muſt be effectual to them to carry a preference upon it.

It can make no difference upon this queſtion, whether the heir who ſells the eſtate of his predeceſſor is a major or a minor, if properly authoriſed, and with conſent of his curators.

The petitioners, indeed, draw an argument from the eſtate in the preſent caſe having been ſold by authority of the court, and contend, that it muſt have the ſame effect as a proceſs of ranking and judicial ſale brought by an apparent heir in terms of the ſtatute

1695, in which the ſubject becomes litigious, and cannot be affected by the diligence of creditors, who are called as defenders therein.

The petitioners have no reaſon to deny, that it was competent for the minor and his curators, when in apparency, or even after having entered *cum beneficio*, to have brought a proper proceſs of ranking and ſale of his eſtate, calling the creditors of the defunct, and concluding to have it ſold by the court, the creditors ranked, and the price paid to them by the purchaſers. The reſpondents may further admit, that, if the proper ſteps had been followed out requiſite in ſuch proceſſes of ranking and ſale, they have by ſtatute the ſame advantages as ſales of bankrupt eſtates under the act 1681. Farther, if any of the creditors had thought fit, they might have brought this eſtate to a judicial ſale; but, as neither they nor the heir ever took one ſtep towards ſuch a ſale, the reſpondents muſt confeſs they are at a loſs to comprehend upon what ground it is the creditors underſtand the preſent ſale, which in nothing differs from every ſale by a minor, to have been conducted in terms of that ſtatute, and to have the effect of a proceſs of ranking and judicial ſale.

The ſtatute has made no form for a minor's bringing ſuch proceſs different from a major; much leſs hath it declared that the common application to your Lordſhips by curators, to find it expedient for the minor to ſell the heritable ſubjects is equivalent, and hath the effect of a proceſs of ranking and judicial ſale upon the act 1681.

The only purpoſe of ſuch application, is to ſupply the want of age in the ſeller, and to make a voluntary ſale by a minor with conſent of curators equivalent to a voluntary ſale by a major.

The creditors are not ſo much as called in ſuch an application, not even edictally; ſo that it can never make the ſubject a *res litigioſa* to them as in a judicial ſale. There is not, nor cannot be any concluſion of ranking in ſuch application.

The ſubject is not ſold judicially by the court, but by the minor for his own behoof, whoſe intereſt alone is attended to; neither is the price payable to the creditors, but to the minor and his tutors

and

and curators, who might in this preſent caſe, no doubt, have uplifted it, and diſpoſed of it as they had a mind, if the arreſtment of the reſpondents had been inept diligence.

So that neither is this a proceſs of ranking and ſale, nor bears the leaſt ſimilarity to it, that the reſpondents are able to diſcover; and it would clearly lead to the groſſeſt abſurdities to give it the effect of ſuch a proceſs, which, if it has in one caſe, muſt hold in all.

The applying for authority from your Lordſhips, is what every minor and his curators do who voluntary ſell an heritable ſubject; yet, who ever heard that after ſuch application, the ſubject became a *res litigioſa* to the creditors of the minor, and that the price of it was locked up from their diligence? *That* however muſt follow, from finding ſo in the preſent inſtance, as there has been nothing further done by the heir or creditors than is done in *all* ſuch caſes.

An argument is raiſed in the petition upon a clauſe in the articles of roup, whereby the purchaſers are bound to find caution within a certain ſhort ſpace; and it is urged, that, as that caution has not been found, the ſale is void. But a ſufficient anſwer ariſes to this from the article itſelf, wherein it is expreſsly declared, that the expoſer may inſiſt for the whole price, even after the time for finding caution is expired, and oblige the purchaſers to hold by the bargain.

If this be competent to the heir, it muſt likewiſe be competent to the reſpondents, to whom the *jus exigendi* is conveyed by the arreſtments. And the fact is, that the purchaſers have been long willing, and have often offered to find caution, or to pay the price; but the heir and his curators have refuſed to accept, merely in order to have this pretence; to which, however, the reſpondents do not apprehend your Lordſhips will pay any regard.

Of a piece with this argument is another thrown in at the end of this petition, that theſe ſubjects may be adjudged by any of the creditors of Robert Reid, as *in hereditate jacente*, which would diſappoint the reſpondents diligence. The reſpondents do not apprehend, that your Lordſhips will pay any regard to a *hypotheſis* of this kind; nor would the heir or his curators be in ſafety now to

lie

lie out unentered, and allow such adjudications to pass, as he is expressly bound by the articles of roup, *totidem verbis*, to make up his titles, and to convey to the purchasers.

Besides, the heir in this case hath no other defence against being universally liable in the defunct's debts, but that he is served heir *cum beneficio*.

He hath already served heir in general, whereby he comes in the right of part of these subjects wherein his predecessor was not infeft. All of them have been sold by him at a public roup; in consequence of which, the purchasers have entered into possession, and been drawing the rents ever since. This would undoubtedly subject him universally for the whole of his predecessor's debts, until he can plead that he is served on inventary; which however he cannot do till he is served *specially* to the subjects therein given up.

The heir, therefore, were he to lie out unentered, and allow the subjects to be carried off by such adjudications, would necessarily lose the benefit of inventary, and subject himself to an universal passive title.

Indeed, his not having already entered to the whole of these subjects, sufficiently shows that he, or rather his curators, several of whom are themselves creditors, are in collusion with the other creditors, to obstruct as much as in their power, the effect of the respondents diligence.

And the respondents must be pardoned to say, that these curators are rather sporting with the interest of their pupil, for their own purposes, in thus delaying to implement a sale made by themselves at a public roup, after obtaining your Lordships authority to it, as a step necessary to his affairs; but the respondents cannot believe that they will persist in this, whereby such damage will accrue to the minor's affairs.

In respect whereof, &c.

GEO. OGILVIE.